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No. 84-1309

In the Supreme Court of the United States

OCTOBER TERM, 1984

EULA B. STARNES, ET AL., PETITIONERS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services, files this supplemental brief to address the effect on this case of the recent decision by the United States Court of Appeals for the Sixth Circuit in *Michigan Academy of Family Physicians* v. *Blue Cross & Blue Shield,* No. 81-1202 (Mar. 19, 1985). Petitioners have filed a supplemental brief calling the Court's attention to that decision, and they have included the opinion as an appendix to their supplemental brief.[1]

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[1]We were preparing this supplemental brief to call the Court's attention to the *Michigan Academy* decision when we received a copy of petitioners' supplemental brief.

In the memorandum in opposition (at 6-7), we pointed out that after this Court vacated the judgment of the Sixth Circuit in *Michigan Academy* and remanded the case for further consideration in light of *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), that court in turn held in a brief per curiam order that the district court had no jurisdiction to entertain a challenge to a regulation affecting the carrier's calculation of the amount of benefits payable for particular Part B services. The Sixth Circuit accordingly remanded the case to the district court with instructions to dismiss the complaint. See *Michigan Academy of Family Physicians* v. *Blue Cross & Blue Shield*, 751 F.2d 809 (6th Cir. 1984).[2] On petition for rehearing filed by the plaintiffs in the case, the Sixth Circuit panel, without extended analysis, has now vacated its earlier order, held that the district court does have jurisdiction over the case under 28 U.S.C. 1331, and reinstated its original opinion (728 F.2d 326 (1984)), which had been rendered before this Court's decision in *Ringer*.

The decision of the panel in *Michigan Academy* is clearly wrong, and the Solicitor General therefore has determined that a petition for rehearing en banc will be filed in that case. We shall briefly address the principal flaws in the Sixth Circuit's brief opinion.

1. In *Ringer* itself, the plaintiffs challenged the validity of a regulation that affected the payment of benefits payable for a particular medical service. Slip op. 3-4. This Court explicitly held (slip op. 5 n.4), however, that insofar as the challenge to the regulation arose under Part B of the Medicare Program, judicial review was entirely precluded by

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[2]In its most recent opinion, the *Michigan Academy* panel erroneously stated (Pet. Supp. Br. App. 2) that it had remanded the case to the district court for further consideration in light of *Ringer*. As noted in the text, the remand was with instructions to dismiss the complaint for lack of jurisdiction, not for further consideration of the jurisdictional issue. 751 F.2d at 810.

the decision in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). In *Erika*, the Court had held that because Congress has expressly provided in 42 U.S.C. 1395ff for judicial review of the "amount of benefits" under Part A of the Medicare Program but not under Part B, "Congress deliberately intended to foreclose further review of such claims" under Part B. 456 U.S. at 208. Because the Court relied on *Erika* for its Part B holding in *Ringer*, the Court's holding in *Ringer* necessarily was that the challenge to the regulation likewise was precluded by 42 U.S.C. 1395ff. The Sixth Circuit therefore was simply wrong when it stated in its most recent *Michigan Academy* opinion that "[i]n reaching its decision in [*Ringer*], the Supreme Court did not rely on § 1395ff" (Pet. Supp. Br. App. 2 n.2).

2. The Sixth Circuit in *Michigan Academy* also erred in holding that *Ringer* does not proscribe judicial review of a regulation where the challenge is made "by a party other than a claimant for benefits" (Pet. Supp. Br. App. 7)—*e.g.*, by the physicians who joined certain Part B beneficiaries as plaintiffs in that suit. It would be perverse indeed for Congress to permit physicians to obtain judicial review but to deny such review to the beneficiaries, who pay premiums to be insured under the Part B Program and therefore are most directly affected by a regulation limiting the amount of benefits that may be paid. The Act itself demonstrates that Congress did no such thing.

a. Under Part A of the Medicare Program, hospitals and other providers of services are reimbursed directly by the intermediaries who administer the Part A Program on the Secretary's behalf, and they are paid in an aggregate amount that covers the reasonable cost of all Part A services rendered during the relevant period. 42 U.S.C. 1395f, 1395g and 1395h. See *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 1-2. Congress also has provided a mechanism for Part A providers to obtain

administrative review of reimbursement disputes before the Provider Reimbursement Review Board and to obtain judicial review in district court (*Heckler* v. *Community Health Services*, slip op. 6), specifically including judicial review of any relevant regulations of the Secretary that limit the amount of the hospital's reimbursement. See 42 U.S.C. 1395oo(f)(1). By contrast, the Act contains no separate mechanism by which physicians and others who furnish Part B services may obtain administrative or judicial review of matters pertaining to the amount of benefits payable under Part B. Congress's express provision for judicial review in suits by providers under Part A but not in suits by their counterparts under Part B (physicians and other suppliers) indicates that Congress has deliberately foreclosed judicial review in the latter situation. *Erika*, 456 U.S. at 208.

The reason for this distinction is readily apparent. In contrast to the Part A Program, Part B benefits are not paid directly to the physician, but to the beneficiary. A carrier administering the Part B Program on behalf of the Secretary may make payment to a physician only if the beneficiary has assigned his claim for benefits to the physician. 42 U.S.C. 1395u(b)(3)(B)(ii). Although the Act itself grants a right of administrative review only to an "individual enrolled under [Part B]" (42 U.S.C. 1395u(b)(3)(C)), the Secretary by regulation has provided that a physician who accepts an assignment stands in the shoes of the beneficiary and has the same right to administrative review by the carrier. 42 C.F.R. 405.801(a); *Erika*, 456 U.S. at 207 n.7. But the assignee physician also is subject to the same preclusion of *judicial* review that applies to the beneficiary. The Court so held in *Erika*. There it was the supplier of Part B services, not the beneficiaries themselves, who sought judicial review (456 U.S. at 204). Yet the Court held that judicial review was precluded.

b. The Sixth Circuit also was clearly wrong if it intended to hold that a beneficiary or physician may obtain judicial review of a Medicare regulation under 28 U.S.C. 1331, notwithstanding applicable preclusions of review, if he does not submit an actual claim for monetary benefits at the same time. That result would permit a ready circumvention of the statutory scheme. Under this rationale, for example, the plaintiff in *Erika* first could have brought an action for injunctive and declaratory relief challenging the particular instructions of the Secretary upon which the carrier relied in limiting the amount of benefits payable; if a favorable ruling were obtained, it then could have sought greater reimbursement from the carrier in administrative proceedings. Congress plainly did not intend that result, and this Court in *Ringer* in fact rejected precisely that means of avoiding the statutory limitations on judicial review. *Ringer*, slip op. 12. Moreover, the Court there held that plaintiff Ringer, who had not yet had the surgery in question and sought only injunctive and declaratory relief to establish that the surgery was a covered service, could not bring an action under 28 U.S.C. 1331 to challenge the regulation that precluded payment under Part A (slip op. 16-23) or under Part B (slip op. 5 n.4).[3]

3. Finally, the Sixth Circuit in its most recent *Michigan Academy* opinion relied on the statement in its pre-*Ringer* opinion that there is a "presumption" favoring judicial review that can be overcome only by a "clear and convincing showing" of congressional intent (Pet. Supp. Br. App. 7,

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[3]Similarly, the Court observed in *Ringer* that Dr. Winter, the physician who performed the surgery, did not assert that he had an independent right to obtain judicial review of the regulation. Slip op. 6 n.6

quoting 728 F.2d at 331). But as this Court held in *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 8-11, the "presumption" of reviewability is only that — a presumption — and the requirement of "clear and convincing evidence" of congressional intent to preclude review has never been applied in the strict evidentiary sense. "[T]he presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole," and "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 9. The Court applied that reasoning in *Erika*, 456 U.S. at 207-208. Under that standard, there can be no doubt from the text and structure of the Medicare Act, the legislative history of 42 U.S.C. 1395ff (see *Erika*, 456 U.S. at 208-210), and this Court's decisions in *Erika* and *Ringer* that judicial review is barred in *Michigan Academy* and in the instant case.[4]

Because the decision of the Sixth Circuit in *Michigan Academy* is clearly wrong and because there is substantial reason to believe that the Sixth Circuit will grant rehearing

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[4]As we have explained (Memo in Opp. 5-6 n.2), petitioners' constitutional challenges to the Secretary's instructions affecting the amount of benefits payable for CT scans are wholly insubstantial. For this reason, there is no occasion to consider here whether this Court's decision in *Erika* forecloses judicial review of substantial constitutional issues that might arise in the administration of the Part B Program. See *Ringer*, slip op. 5 n.4. That issue likewise is not presented in *Michigan Academy*, because the Sixth Circuit there did not consider the plaintiffs' constitutional challenge to the method the carrier developed to calculate the amount of benefits payable for family physicians' services. See Pet. Supp. Br. App. 1; 728 F.2d at 332 n.5.

en banc and reverse the panel's holding in that case,[5] the conflict between the decision in *Michigan Academy* and the decision of the Fourth Circuit in the instant case does not warrant review by the Court at this time. If the Sixth Circuit adheres to its view, or if another court of appeals should disagree with the court below, there will be time enough for the Court to consider the matter.

For the foregoing reasons and the additional reasons stated in the memorandum in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[5]We note that the panel in *Michigan Academy* consisted of only one circuit judge in regular active service, who was joined by two senior circuit judges.

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